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RE BANDAR KINRARA PROPERTIES SDN BHD (IN LIQUIDATION)

HIGH COURT MALAYA, KUALA LUMPUR
NADZARIN WOK NORDIN JC
[POST WINDING-UP NO: WA-28PW-312-09-2020]
22 MARCH 2021

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COMPANY LAW: *Liquidators – Application for directions – Developer wound-up – Whether liquidator stepped into developer's shoes – Whether joint management body ('JMB') could be authorised to act on behalf of purchasers on matters under sale and purchase agreement – Obligations of developers to rectify defects in common property and application for strata titles pending – Whether liquidator duty-bound to carry out obligations of developer – Whether stakeholder sums becomes assets of company – Whether liquidator entrusted with discretion to utilise stakeholder sums – Companies Act 2016, s. 479 – Housing Development (Control and Licensing) Act 1966, s. 7A(5) and (6)*

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The respondent, a development company licensed under the Housing Development (Control and Licensing) Act 1966 ('HDA'), was the developer of a residential condominium project known as Duet Residence. The joint management body ('JMB') was established *via* its first annual general meeting. The respondent was subsequently wound-up, and the liquidators were appointed. The 2.5% held by the vendor's solicitors as stakeholder vested on the liquidator pursuant to s. 7A(6) of the HDA ('stakeholder sum'), was handed over to the liquidator. The company had outstanding obligations under the sale and purchase agreements ('SPAs') that had not been completed which, *inter alia*, included the rectification of common property and application for strata titles. Disputes arose as to the stakeholder sum for rectification of defects amounting to at least RM3,313,656.84 million. The JMB requested for the release of the stakeholder sum premised on the need to rectify a list of defects of the common property based on a resolution passed by an EGM on 27 January 2019. However, the EGM was held defective/invalid under s. 32(3) of the Strata Management Act 2013 ('SMA'). The liquidator subsequently informed the JMB that the stakeholder sum had been released to it pursuant to s. 7A(6) of the HDA. The JMB thus held another EGM on 1 June 2019 and based on the resolution ('1 June 2019 resolution') passed by 22 purchasers out of a total of 223 purchasers, renewed their request for the entire stakeholder sum to be released to them, *ie*, the JMB. In this notice of motion ('application') pursuant to ss. 479, 487(3), 527 and 528 of the Companies Act 2016 ('CA') the liquidators sought, *inter alia*, directions be given for the following questions: (i) whether the JMB could be authorised to act on behalf of the purchasers of the respective units in respect of the matters under the SPAs (ii) whether the estimated sum of RM1,690,547.65 be utilised, expended and paid out in a certain manner; and

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(iii) whether the sum of RM1,236,000 as estimated by the liquidators as liquidation administration expenses which include liquidators', remuneration and all other costs and expenses of the winding up be allocated or 'ring fenced' and paid out accordingly.

Held (order accordingly):

(1) The law on directions being sought under s. 487 of the CA is clear, in that, the directions are in the nature of an advice and not a judgment or order and that the scope therein is confined to guidance on matters of law and principle. Under the HDA, the liquidators takeover from the 'developer', *ie*, steps into the shoes of the company upon liquidation of the company. The liquidator was thus-duty bound to carry out the duties and obligations of the company under the HDA *vis-à-vis* as the housing developer of Duet Residence. (paras 40, 42 & 43)

(2) The JMB was a legal entity created by the SMA and its powers and duties were derived from the SMA and the regulations thereto. Based on s. 21 of the SMA, the JMB did not have the power to enable the delegation or the assignment of the rights by the purchasers under the SPAs to the JMB despite the calling of the EGM on 1 June 2019 and the purported 1 June 2019 resolution passed thereto. The resolution, passed by only 22 purchasers out of a total of 223 purchasers, was immaterial. As there was no power under the SMA for the JMB to assume the rights of the purchasers under the SPAs, the resolution and the purported assumption of the purchaser's rights in Duet Residence was clearly *ultra vires* the SMA and was not within the powers of the JMB to accept and to act accordingly. (paras 47-49)

(3) The word 'proceedings' in s. 143(2) of the SMA refers to proceedings before a judicial body such as a court of law or a quasi-judicial body such as the Strata Management Tribunal. It is clear that the word 'proceedings' do not refer to the right of the JMB to represent or assume the rights of the purchasers under the SPAs. Further, there was no mention in s. 143(2) for the JMB to take over and/or assume the rights of the purchasers under the SPAs or other agreements. Hence, there was no legal provision which allowed the JMB to take over the rights of the purchasers under the SPAs. It would also not be fair on the purchasers who would lose out on their rights to claim for the rectification costs of their respective units should the JMB be entitled to make a claim on the stakeholder sums on behalf of the purchasers as it would run contradictory to the intention and purport of cl. 29(2) of the SPAs. (paras 54, 55, 62 & 63)

(4) The liquidators, having assumed the obligations of the developer, would be faced with insufficient funds to settle each and every obligation under the SPAs and the HDA. Once the stakeholder sums had been released to the company, the stakeholder sums will then become an asset of the

company and the liquidators would have to deal with the same and utilise the monies accordingly in accordance with ss. 7A(5) and (6) of the HDA. Based on the SPAs, the defect liability period had expired, and as such, the stakeholder sums were to be regarded as general monies held in the housing development account. However, r. 7 of the Housing Development (Housing Development Account) Regulations 1991 does not stipulate the priority in which monies in the account has to be paid out or utilised. As the custodian of the stakeholder sum under the HDA, the liquidators were entrusted with the discretion as to how the stakeholder sum was to be utilised to fulfil the outstanding obligations of the housing developer. (paras 65, 66, 69, 74 & 75)

(5) Under the Strata Titles Act 1985, it is the paramount duty of the developer, in this case, the liquidators, to apply for the strata titles in accordance with s. 8 of the Strata Titles Act 1985. It thus follows that the application for strata titles could not be done by any other person or third parties, including the JMB or the purchasers of the units in Duet Residence. After utilising the sums to apply for the strata titles, the liquidators were to carry out other obligations under the SPAs and in the winding-up of the company. Thereafter, it was open to the liquidators, pursuant to s. 7A of the HDA, to apply the balance monies, if any, in accordance with the law of winding up, *ie*, the payment of dividend to the unsecured creditors in *pari passu* manner. (paras 76, 79, 81 & 82)

(6) The liquidators estimated that they would require RM1,236,000 as administrative expenses, which included the liquidators' remuneration for the completion of the obligations under the SPAs and the conduct of winding down the business of the company as well as legal fees. The liquidators had complied with and obtained the approval of the creditors pursuant to s. 479(2)(b) of the CA. Hence, the sum as estimated by the liquidators as liquidation administration expenses which includes liquidators' remuneration (calculated on a time-costs basis), solicitors fees and disbursements and all other costs and expenses of the winding-up, were fair and reasonable and may be allocated and paid out accordingly (paras 91, 92 & 94)

Case(s) referred to:

Badan Pengurusan Bersama Kompleks Pandan Safari Lagoon v. Tam Cheng Meng [2018] 8 CLJ 361 HC ***(dist)***

Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation [2020] 10 CLJ 285 FC ***(dist)***

JMB Silverpark Sdn Bhd v. Silverpark Sdn Bhd & Anor [2012] 1 LNS 1082 HC ***(refd)***

K Balasubramaniam (Likuidator Bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBf Finance Bhd & Ors [2005] 1 CLJ 793 FC ***(refd)***

Kepong Prospecting Ltd v. Schmidt [1968] AC 810 ***(refd)***

Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals [2012] 2 CLJ 501 FC ***(refd)***

Perbadanan Pengurusan 3 Two Square v. 3 Two Square Sdn Bhd & Anor And Another Appeal [2019] 1 LNS 2281 CA ***(dist)***
Plaza 393 Management Corporation v. Ekuiti Setegap Sdn Bhd [2016] 1 LNS 1398 HC ***(refd)***
Prangin Mall Sdn Bhd v. Tang Joo Ming & Anor [2012] 1 LNS 1285 CA ***(refd)***
Saujana Triangle Sdn Bhd v. JMB Perdana Exclusive And Tropics [2017] 1 LNS 1035 HC ***(dist)***
Syarikat East Coast & Ors v. Makna Mujur Sdn Bhd & Ors [2020] 2 CLJ 539 CA ***(dist)***

Legislation referred to:
Civil Law Act 1956, s. 4(3)
Companies Act 2016, ss. 479(2)(b), 487(3), 527, 528
Housing Development (Control and Licensing) Act 1966, ss. 3, 7A(5), (6)(b)
Housing Development (Housing Development Account) Regulations 1991, regs. 4(1), 7
National Land Code, s. 120
Strata Titles Act 1985, s. 8(2), (3), (4), (5), (8)(a)
Strata Management Act 2013, ss. 15, 17(2), 21, 22, 23, 32(3), 143(2), 148

For the applicant liquidators - Mark Ho & Eldarius Yong; M/s Chellam Wong
For the joint management body of Duet Residence - Henry Quah & Dwayne Pinto; M/s The Chambers of Lim Yeeu Ren

Reported by S Barathi

JUDGMENT

Nadzarin Wok Nordin JC:

[1] Before this court is a notice of motion (application) filed by the liquidators Dato' Heng Ji Keng and Andrew Heng (liquidators) of Bandar Kinrara Properties Sdn Bhd (in liquidation) ("company") pursuant to ss. 479, 487(3), 527 and 528 of the Companies Act 2016 for *inter alia* directions be given on the following questions:

(i) whether the joint management body ("JMB") of Duet Residence can be authorised to act on behalf of the purchasers of the respective units in Duet Residence in respect of the matters under the respective sale and purchase agreements ("SPAs")

(ii) the estimated sum of RM1,690,547.65 (the remainder after deducting liquidation administration expenses from the stakeholder sums of RM3,313,656.84) be utilised, expended and paid out in the following manner:

(a) firstly, application for strata title and all expenses incidental thereto;

(b) secondly, costs of rectification of the common properties pursuant to the SPAs;

(c) thirdly, payments to the creditors of the company (preferred creditors, unsecured creditors and others);

(iii) the sum of RM1,236,000 as estimated by the liquidators as liquidation administration expenses which includes liquidators remuneration (calculated on a time-costs basis), solicitors fees and disbursements and all other costs and expenses of the winding up be allocated or "ring fenced" and paid out accordingly.

Background Facts

[2] The said respondent is a development company licensed under the Housing Development (Control and Licensing) Act 1966 and was the developer of a residential condominium project consisting of 233 individual residential units known as Duet Residence at Bandar Kinrara straddling the boundary of Puchong, Selangor and Bukit Jalil, Kuala Lumpur, consisting of:

(i) Block A – 112 units of which the certificate of practical completion and compliance (CPCC) was obtained on 22 June 2017 and delivery of vacant possession for the same was done on 23 June 2017; and

(ii) Block B – 121 units of which the certificate of practical completion and compliance (CPCC) was obtained on 13 November 2017 and delivery of vacant possession for the same was done on 16 November 2017.

[3] The selling price for the said units developed ranged between RM600,000 to RM1.5 million.

[4] The JMB was established *via* its first annual general meeting convened by the respondent on 18 August 2018.

[5] Issues then arose as to the handing over of the accounts, missing common property and material issues were of and on the rectification of defects in the common property arising during the defect liability period.

[6] The respondent was however ordered to be wound up on 28 November 2018, wherein Dato' Heng Ji Keng and Andrew Heng ("liquidators") of Ferrier Hodgson MH Sdn Bhd were appointed as joint and several liquidators of the respondent.

[7] The 2.5% held by the vendor's solicitors, Messrs Azhar & Wong, as stakeholder vested on the liquidators pursuant to s. 7A(6) of the Housing Development (Control and Licensing) Act 1966 ("stakeholder sum") was handed over to the liquidators on 11 March 2019 by the said respondent's stakeholder solicitors.

[8] The company has outstanding obligations under the SPAs that has not been completed which *inter alia* included the rectification of common property and application for strata titles.

[9] Based on the date of delivery of vacant possession of the respective blocks, the defects liability period of the units in Duet Residence and the common property therein expires on 7 July 2019 for Block A and 30 November 2019 for Block B respectively.

[10] Disputes then arose as to the stakeholder sum for rectification of defects amounting to at least RM3,313,656.84 million.

[11] The JMB had requested for the stakeholder sum to be released to it premised on the need to rectify a list of defects of the common property which are yet to be carried out based on a resolution passed by an EGM on 27 January 2019.

[12] The MPSJ however informed that the EGM was defective/invalid under s. 32(3) of the Strata Management Act 2013 ("SMA 2013"). By a letter dated 29 March 2019, the liquidators informed the JMB that the stakeholder sum has been released to it pursuant to s. 7A(6) of the Housing Development (Control and Licensing) Act 1966 ("HDA"), but clarified that:

> … Meanwhile, please be informed that the purchasers/JMB are to rectify the defects and submit the supporting documents, ie, quotations, invoices, proof of completion of rectification, proof of payment, photographs etc., to us for our verification purpose prior to us releasing the stakeholder sum to you.

[13] The JMB then held another EGM on 1 June 2019 and based on a resolution passed by 22 purchasers whom attended, out of a total of 223 purchasers, and renewed their request for the entire stakeholder sum to be released to them (ie the JMB).

Liquidator's Submissions

[14] The liquidators state that pursuant to the SPAs, the liquidators have set aside RM543,000 for rectification of defects of individual units which is subject to change as the final invoices for the rectification of works of the individual units have yet to be issued and after deducting the said sum from the stakeholder sum, they have approximately RM2,925,783.21 remaining in the accounts of the company.

[15] Based on the liquidators' calculation, they will require approximately RM1,236,000 as liquidation expenses of the effective winding up of the company ("liquidation expenses") and RM1,200,000 for the rectification of the common property defects ("rectification costs").

[16] Only 34 of the purchasers have submitted their claims amounting to RM454,584.43 for the respective stakeholder sums within the defects liability period for the common property (the 34 DLP claims).

[17] Since the application herein is for directions of this court under s. 487 of the Companies Act 2016, the liquidators submit that such a motion does not allow the JMB to submit or claim for monies herein.

[18] It is the liquidators' submissions that the liquidators are duty-bound to carry out the duties and obligations of the housing developer.

[19] The liquidators further submit that the only monies left in the company's accounts are the stakeholder sums and given the limited cash and the competing claims of the JMB, if the stakeholder sums are to go to the JMB, there would be no money left for the liquidators to carry out their work and complete the company's obligations under the SPAs and the liquidation itself.

[20] The liquidators' contend that once the stakeholder sums are released to the company, it becomes the assets of the company and subject to the purview and control of the liquidators.

[21] It is submitted by the liquidators that they should be able to exercise their discretion in this respect as long as such expenditure is within the framework of the relevant legal provisions, including but not limited to completing its obligations to apply for and to issue the individual strata titles.

[22] The liquidators further submit that the application, issuance and transfer of strata title is of paramount importance as can be seen by s. 8 of the Strata Titles Act 1985.

[23] The liquidators submit that the completion of the application, issuance and transfer of strata titles should take priority over all other obligations under the SPAs given the penal nature of s. 8 of the Strata Titles Act 1985 and the importance of strata titles to the individual purchasers.

[24] The liquidators further submit that after the obligations under the SPAs are completed, the liquidators may, pursuant to s. 7A of the HDA apply the monies in accordance with the law of winding up ie, the payment of dividend to the unsecured creditors in a *pari passu* manner.

[25] It is contended by the liquidators that they should be able to perform this duties with the peace of mind that they will be duly remunerated and such remuneration commemorates with the time and effort expended and therefore asks that the sum of RM1,236,000 as administrative expenses, which shall include liquidators' remuneration for the completion of the obligations under the SPAs and the conduct of winding down the business of the company, as well as legal fees, be ring fenced.

JMB's Submissions

[26] The JMB assert that they were short changed of five common facilities/property promised in their SPAs with the company and in the sale brochure, namely (i) café with roof garden; (ii) waiting lounge at ground floor; (iii) function room; (iv) yoga terrace; and (v) lily pond. These, they alleged were not handed over and the function room, café with roof garden and the waiting lounge at ground floor were illegally sold to third parties by the company just months prior to the company being wound up.

[27] It is submitted by the JMB that these matters affect the legal and statutory duties and powers of the JMB. Specifically, but not limited to the critical common property rectification as well as the propriety and priority in the utilisation of the stakeholder sum.

[28] The JMB also asserts that various documents belonging to the JMB in particular documents like the schedule of parcels, as-built drawings and development orders were not handed over as well by the company to the JMB.

[29] Equally important the JMB submits is also the fact that there are outstanding monies (maintenance fees and sinking fund fees) amounting to RM425,253.95 (company's dues) which has not been handed over to the JMB for unsold units as well as units in Block B of the premise, which were promised by the company to the respective unit owners that it shall be paid on their behalf.

[30] The JMB submits that court should be guided to take note the strict words in the SMA 2013 which restricts and/or limits what the developer can and cannot do which only meant that the developer cannot do "as they like" when it comes to the monies for the common property. These duties and powers are transient as the developer is statutory obligated to handover everything to the JMB.

[31] The JMB contends that s. 15 of the SMA 2013 clearly sets out the statutory obligation in the handing over by the developer to the joint management body which only leads to one conclusion and that is to facilitate to the JMB in carrying out its duty and exercising its power *vis-a-vis* the buildings intended for subdivision and common property.

[32] The JMB seeks that this court take notice that in the SMA 2013 there is nothing specifically post the JMB taking over from the developer that entitles the developer and/or in our case the respectful liquidator to do anything and/or assert any right to the common property.

[33] The JMB further submits that s. 143 of the SMA 2013 empowers the JMB and statutorily gives the JMB the "*locus standi*" to sue and be sued on matters pertaining to the common property which clearly shows that the JMB has the right to represent all unit and/or parcel owners in any matter pertaining to the common property.

[34] The JMB thus submit that in this case the liquidator appointed by court ought to defer their judgment to that of the JMB. In that it was best left to the JMB to decide on matters pertaining to their legal, beneficial and equitable rights to the common property.

[35] As to the HDA, the JMB states that the HDA is an act to protect house buyers and the JMB further asserts that whatever view taken by the liquidators and/or view and/or direction it must be in line with the SMA 2013 and to give weight, force and due recognition of the statutory duty, power and/or benefits befitting the JMB.

[36] The JMB submit that since it was the developer who was at fault for not rectifying the common property when having notified of the earliest opportunity, the JMB cannot now be made to suffer from their fault.

[37] The JMB reiterates s. 7A of the HDA, and contends that its wise draftsmen and the Executive having passed the said Act had promulgated in the event the developer is wound up and that the stakeholder monies ARE NOT the property of the developer.

[38] The JMB further contends that the statutory SPA and the HDA must be construed in line with the SMA 2013 in that the statutory duty and powers of the JMB ought not be curtailed.

[39] It is also submitted and acknowledged by the JMB that at the second creditors meeting it was agreed that the liquidators' remuneration be at time-costs. However they contend that, (i) it was not categorically stated as to what is the source of the remuneration; (ii) there is no agreement that the remuneration will be from the stakeholder sum; and (iii) that it will contravene s. 7A of the HDA; or (iv) that will contravene the priority in payment per s. 7A(6)(b) of the HDA.

Court's Findings

[40] The law on directions being sought under s. 487 of the Companies Act 2016 is clear in that the directions are in the nature of an advice and is not a judgment or order and that the scope therein is confined to guidance on matters of law and principle, see the Federal Court cases of *Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals* [2012] 2 CLJ 501; [2012] 2 MLJ 713 and *K Balasubramaniam (Likuidator Bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBf Finance Bhd & Ors* [2005] 1 CLJ 793.

The Housing Development (Control And Licensing) Act 1966 *Vis-A-Vis* The Liquidators

[41] As to the effect of s. 7A(5) and (6) of the HDA, it is provided therein that:

> (5) Subject to paragraph (6)(b), all moneys in the housing Development Account and all moneys held by the stakeholder shall, notwithstanding any other written law to the contrary, be deemed not to form part of the property of the licensed housing developer in the event:

(a) the licensed housing developer enters into any composition or arrangement with his creditors or has a receiving order or an adjudication order made against him; or

(b) the licensed housing developer, being a company, goes into voluntary or compulsory liquidation.

(6) Upon the happening of any of the event referred to in subsection (5):

(a) the moneys in the Housing Development Account shall vest in the official receiver, trustee in bankruptcy or liquidator as the case may be, to be applied for all or any of the purposes for which monies in the Housing Development Account and moneys held by the stakeholder are authorised by regulations made under this Act to be withdrawn; and

(b) any money remaining in the Housing Development Account after all payments have been made pursuant to paragraph (a) and all liabilities and obligations of the licensed housing developer under the sale and purchase agreements in respect of the housing development have been fully discharged and fulfilled, shall be held by the official receiver, trustee in bankruptcy or liquidator as the case may be, as money belonging to the licensed housing developer to be applied in accordance with the law relating to bankruptcy of or the winding-up of a company.

[42] Under the HDA, the liquidators take over from the "Developer" ie, step into the shoes of the company upon liquidation of the company as can be seen in the definition of "housing developer" under s. 3 of the HDA which states:

> "housing developer" means any person, body of persons, company, firm or society (by whatever name described), who or which engages in or carries on or undertakes or causes to be undertaken a housing development, and in a case where the housing developer is under liquidation, includes a person or body appointed by a court of competent jurisdiction to be the provisional liquidator or liquidator for the housing developer.

[43] In essence, the liquidator is thus duty-bound to carry out the duties and obligations of the company herein under the HDA *vis a vis* as the housing developer of the Duet Residence.

JMB *Vis A Vis* The Purchasers And The Common Property

[44] Let me at the outset be very clear that the directions sought by the liquidators herein before me are in respect of (i) whether the JMB can be authorised to act on behalf of the purchasers of the respective units in respect of the matters under the SPAs; (ii) whether the estimated sum of RM1,690,547.65 be utilised, expended and paid out in a certain manner; and (iii) whether the sum of RM1,236,000 as estimated by the liquidators as

liquidation administration expenses which include liquidators' remuneration and all other costs and expenses of the winding up be allocated or "ring fenced" and paid out accordingly. The application does not have anything to do with the rights of a JMB over the common property or the entitlement of the developer and/or in our case the liquidator to do anything and/or assert any right to the common property.

[45] On that front, this court will now address the issue of whether the JMB can act for the purchasers of the units in Duet Residence in respect of the matters under the SPAs. Under the SMA 2013, the JMB is created upon the following events as stated in s. 17 therein being as follows:

> (1) A joint management body shall be established upon the convening of the first annual general meeting of that joint management body:
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> (a) if vacant possession was delivered before the commencement of this Act, not later than twelve months from the commencement of this Act; or
>
> (b) if vacant possession is delivered after the commencement of this Act, not later than twelve months from the date of delivery of vacant possession of a parcel to a purchaser.

[46] Sub-section 17(2) of the SMA 2013 then provides that the joint management body is a body corporate having perpetual succession. The said sub-section reads:

> (2) The joint management body established by subsection (1) shall be a body corporate having perpetual succession and a common seal.

[47] Based upon the aforesaid, the JMB is a legal entity created by the SMA 2013 and its powers and duties therein are derived from the said SMA 2013 and the regulations thereto. The relevant provision being s. 21 of the SMA 2013 which provides as follows:

> (1) The duties of a joint management body shall be as follows:
>
> (a) to properly maintain and manage the building or land intended for subdivision into parcels and the common property, and keep it in a state of good and serviceable repair;
>
> (b) to determine and impose the Charges to be deposited into the maintenance account for the purpose of the proper maintenance and management of the buildings or lands intended for subdivision into parcels and the common property;
>
> (c) to determine and impose the contribution to the sinking fund to be deposited into the sinking fund account for the purpose of meeting the actual or expected expenditure specified under subsection 24(2);
>
> (d) to effect insurance according to this Act or to insure against such other risks as the parcel owners may by special resolution direct;

(e) to comply with any notice or order given or made by the local authority or any competent public authority requiring the abatement of any nuisance on the common property, or ordering repairs or other work to be done in respect of the common property or other improvements to the common property;

(f) to prepare and maintain a register of all parcel owners of the buildings or lands intended for subdivision into parcels;

(g) to ensure that the accounts required to be maintained by the joint management body under this Act are audited and to provide audited and to provide financial statements for the information to its members;

(h) to enforce the by-laws; and

(i) to do such other things as may be expedient or necessary for the proper maintenance and management of the buildings or lands intended for subdivision into parcels and the common property.

(2) The powers of the joint management body shall be as follows:

(a) to collect the Charges from the parcel owners in proportion to the allocated share units of their respective parcels;

(b) to collect the contribution to the sinking fund from the parcel owners;

(c) to authorise expenditure for the carrying out of the maintenance and management of the buildings or lands intended for subdivision into parcels and the common property;

(d) to recover from any parcel owner any sum expended by the joint management body in respect of that parcel in complying with any such notice or order as referred to in paragraph (1)(e);

(e) to purchase, hire or otherwise acquire movable property for use by the parcel owners in connection with their enjoyment of the common property;

(f) to employ or arrange and secure the services of any person or agent to undertake the maintenance and management of the common property of the building or lands intended for subdivision into parcels;

(g) subject to subsection 32(3), to make additional by-laws for the proper maintenance and management of the buildings or lands intended for subdivision into parcels and the common property; and

(h) to do all things reasonably necessary for the performance of its duties under this Act and for the enforcement of the by-laws.

[48] A reading of the said s. 21 of the SMA 2013 does not state any express power for the JMB to assume the rights of the purchasers under the SPAs. Conversely I am thus of the view that the JMB does not have the power to enable the delegation or the assignment of the rights by the purchasers under

A the SPAs to the JMB despite the calling of the EGM dated 1 June 2019 ("1 June 2019 resolution") by the JMB and the purported resolution passed thereto which allowed for *inter alia*:

> To authorise, empower, confirm and ratify all actions of Duet Residence Joint Management Body (JMB) to act for and on behalf of the Purchasers
B of Duet Residence pursuant to SECTION 29 and any relevant sections of the Principle Sales and Purchase Agreement ("SPA") between the Purchaser and the Developer, Bandar Kinrara Properties Sdn Bhd to claim from the retention sum of 2.5% held by the Developer's solicitors as stakeholder, Messrs Azhar & Wong/Ferrier Hodgson MH Sdn Bhd/any stakeholders, for all cost of rectification of the defects on the Common
C Property of Duet Residence during the defect liability period as provided in the SPA.

[49] In my view whether this 1 June 2019 resolution was passed by only 22 purchasers out of a total of 223 purchasers is immaterial, as the issue is whether the said 1 June 2019 resolution was validly passed to allow the JMB
D to assume the rights of the purchasers under the SPAs. I hold that as the JMB is a creature of statute, it can only act in accordance with the powers given to it by its enabling Act being the SMA 2013. As there is no power under the SMA 2013 for the JMB to assume such rights of the purchasers under the SPAs, the 1 June 2019 resolution and the purported assumption of the
E purchasers rights in Duet Residence arising thereto is clearly *ultra vires* the SMA 2013 and is not within the powers of the JMB as such to accept the same and to act accordingly.

[50] I therefore cannot agree with the JMB's contention that the resolution passed on the issues as to the common property was within the JMB powers
F under the SMA 2013, ss. 21, 22 and 23 of the said SMA 2013 accordingly as the 1 June 2019 resolution specifically speaks of the power "to act for and on behalf of the Purchasers of Duet Residence … and any relevant sections of the Principle Sales and Purchase Agreement ("SPA") between the Purchaser and the Developer, Bandar Kinrara Properties Sdn Bhd to claim
G from the retention sum of 2.5% held by the developer's solicitors as stakeholder", which I have decided above is *ultra vires* the powers of the JMB under the SMA 2013.

[51] I also hold that the JMB cannot enforce the rights under the SPAs as the JMB is not a party to the SPAs; the *locus classicus* of such a principle can
H be found in *Kepong Prospecting Ltd v. Schmidt* [1968] AC 810 where the Privy Council had held that a contract cannot, as a general rule, confer contractual rights or impose contractual obligations arising under it on any person except the parties to it. The parties to the contract must necessarily be the persons who signed the agreement.

I

[52] Thus, the JMB, apart from my decision as to the JMB's being *ultra vires* its powers as stated above, cannot legally assume the rights of the purchasers under the SPAs for the simple reason that the JMB is not privy to the SPAs. It is the purchasers, and they alone, who can exercise their rights under the SPAs and no one else in the absence of any evidence before this court of any assignment of rights or novation of the SPAs to the JMB.

[53] The JMB has attempted to rely on s. 143(2) of the SMA 2013 to support their contention that they are entitled to represent all the purchasers in the claim for the stakeholder sums. I have had the opportunity to carefully read the said s. 143(2) of the SMA 2013 and find that the said section only deals with representation in proceedings. Section 143(2) of the SMA 2013 reads as follows:

> (2) Where all or some of the parcel owners or proprietors of the parcels in a development area:
>
> (a) are jointly entitled to take proceedings for or with respect to the common property in that development area against any person or are liable to have such proceedings taken against them jointly; or
>
> (b) are jointly entitled to take proceedings for or with respect to any limited common property in that development area against any person or are liable to have such proceedings taken against them jointly, the proceedings may be taken:
>
> (A) in the case of paragraph (2)(a), by or against the joint management body or management corporation; or
>
> (B) in the case of paragraph (2)(b), the subsidiary management corporation constituted for that limited common property,
>
> as if the joint management body, management corporation or subsidiary management corporation, as the case may be, were the parcel owners or the proprietors of the parcels concerned.

[54] The said s. 143(2) of the SMA 2013 speaks specifically that "the proceedings may be taken – by or against the joint management body" where the "parcel owners or proprietors of the parcels" are "jointly entitled to take proceedings for or with respect to the common property". There is no definition of the word "proceedings" in the SMA 2013 but the natural and ordinary meaning of the word is described in the concise *Oxford English Dictionary,* 11th edn, Revised as "1. an event or series of activities with a set procedure 2. law action taken in a court to settle a dispute." I thus hold the view that the word "proceedings" thereto refers to proceedings before a judicial body such as a court of law or a *quasi*-judicial body such as the Strata Management Tribunal. Be that as it may, it is clear to this court that the word "proceedings" do not refer to the right of the JMB to represent or assume the rights of the purchasers under the SPAs.

[55] It is also pertinent to note that no mention whatsoever is made in the said s. 143(2) for the JMB to take over and/or assume the rights of the purchasers under the SPAs or other agreements for that matter. As mentioned earlier, the said section in my view only relates to the right of the JMB to represent the parcel owners or proprietors of the parcels who are jointly entitled to take the aforementioned legal proceedings for or with respect to the common property.

[56] The JMB had attempted to rely on the case of *Badan Pengurusan Bersama Kompleks Pandan Safari Lagoon v. Tam Cheng Meng* [2018] 8 CLJ 361 where the JMB contends that Her Ladyship Faizah Jamaludin JC decided on s. 15 of the SMA 2013 and on the legal issue as to the transfer of duties and powers to the JMB when the JMB is formed and whether there was need for an assignment of rights and where Her Ladyship had held "[38] Accordingly, I find that by reason of these statutory provisions in the SMA 2013, there is no legal necessity for an assignment under s. 4(3) of the CLA from the developer or the liquidator to transfer to the plaintiff of its rights to collect the charges from the defendant. The SMA 2013 has cured the *lacuna* identified by the Court of Appeal in *Prangin Mall*. The reason why the Court of Appeal held that an assignment was required in that case was because there was no express statutory provision giving the developer the right to collect the service charges and requiring the developer to transfer/hand over that right to the JMB".

[57] I have carefully read *Badan Pengurusan Bersama Kompleks Pandan Safari Lagoon* (*supra*) and find that the case was decided on the basis of the facts and issues before it being a claim against the defendant therein for outstanding service charges for the building, wherein on appeal to the High Court the issues that arose were (i) whether the Magistrate had erred when she held that there had to be an assignment under s. 4(3) of the Civil Law Act 1956 ("CLA") from the developer and the property managers appointed by the liquidator to the plaintiff, in order for the plaintiff to have a cause of action against the defendant for the unpaid management fees for the period from 2005 to 13 June 2014 ie, the date of the plaintiff's constitution.

[58] With respect the aforesaid case of *Badan Pengurusan Bersama Kompleks Pandan Safari Lagoon* (*supra*) did not contain a similar issue as the one before me ie, whether the JMB can be authorised to act on behalf of the purchasers of the respective units in in respect of the matters under the SPAs. I am of the view that the said *ratio* in *Badan Pengurusan Bersama Kompleks Pandan Safari Lagoon* (*supra*) is limited to issues relating to the common property only which the SMA 2013 specifically governs and not to other matters such as the SPAs which is a totally different subject matter altogether. A similar reasoning can be given to the other quoted cases by the JMB being *Saujana Triangle Sdn Bhd v. JMB Perdana Exclusive And Tropics* [2017] 1 LNS 1035;

[2017] MLJU 1020 and *Syarikat East Coast & Ors v. Makna Mujur Sdn Bhd & Ors* [2020] 2 CLJ 539; [2020] 2 MLJ 654, all of which relates to the JMB having the power to act in respect of the common property as opposed to powers and/or rights of the individual unit owners under the SPAs, which is a contractual issue and not a power or right given by statute.

[59] This court therefore does not disagree with the aforesaid cases nor with the case of *Perbadanan Pengurusan 3 Two Square v. 3 Two Square Sdn Bhd & Anor And Another Appeal* [2019] 1 LNS 2281; [2019] MLJU 1983 again a dispute as to duties arising out of the common property, where it was held by Vazeer Alam Mydin Meera JCA at the Court of Appeal that the court ought defer its judgment to the judgment of the committee of the management corporation in that they were in the best position to govern the affairs of their property. As stated by me, one of the issue before me is simply whether the JMB can act *vis a vis* the powers and/or rights of the individual unit owners under the SPAs ie, a contract of which the JMB is not privy to, which I have decided that the JMB cannot do so, and not with respect concerning the statutory duty and powers of the JMB which may be curtailed.

[60] The JMB had also attempted to persuade this court that the Federal Court had recently reiterated the importance of the HDA in *Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation* [2020] 10 CLJ 285 where the Federal Court had held:

> [26] The SMA 2013 is without doubt, a social legislation. It was passed to facilitate the affairs of strata living for the good of the community or owners of the strata title. Being social in nature, the provisions of the SMA 2013 which safeguard community interests ought to receive a liberal interpretation and not a restricted or rigid one. Accordingly, where two different interpretations are possible, it is the one which favours the interest of the community over the interest of the individual that is to be preferred. This is in line with the aforementioned decisions in *Ang Ming Lee* and *Hoh Kiang Nga*n.

[61] A reading of *Innab Salil* (*supra*) will show that the said case centred on whether house rules done by the JMB may override and supersede the express land use on the title imposed by the State Authority under s. 120 of the National Land Code ("NLC"). I respectfully state that *Innab Salil* (*supra*) is to be confined to the questions posed to the Federal Court only, in particular the issue of the interpretation of the house rules concerned when compared with the NLC. I also am of the view that the matter before me is not one "where two different interpretations are possible" as the issue before me is one which concerns a statute ie, the SMA 2013 and one under contract ie, the SPAs.

[62] Hence I do hold that there is no legal provision which allows the JMB to take over the rights of the purchasers under the SPAs.

[63] I agree with counsel for the liquidators that it would also not be fair on the purchasers who would lose out on their rights to claim for the rectification costs of their respective units should the JMB be entitled to make a claim on the stakeholder sums on behalf of the purchasers as it will run contradictory to the intention and purport of cl. 29(2) of the SPAs which reads:

> If the said defect, shrinkage or other faults in the said Parcel or the said Building or the said common property have not been made good by the Vendor within the said period of thirty (30) days under subclause (1), the Purchaser shall be entitled to carry out the works to repair and make good the said defect, shrinkage or other faults himself and to recover from the Vendor the costs of repairing and making good the same and the Purchaser may deduct such costs from any sum which has been held by the Vendor's solicitors as stakeholder for the Vendor under item 5 of the Third Schedule provided that the Purchaser shall, at any time after the expiry of the said period of thirty (30) days, notify the Vendor of the cost of repairing and making good the said defect, shrinkage or other faults before the commencement of the works and shall give the Vendor an opportunity to carry out the works himself within fourteen (14) days from the date the Purchaser has notified the Vendor of his intention to carry out the said works and provided further that the Purchaser shall carry out and commence the said works as soon as practicable after the Vendor's failure to carry out the said works within the said period of fourteen (14) days. In such an event, the Vendor's solicitors shall release such costs to the Purchaser from the stakeholder sum held by the Vendor's solicitors under item 5 of the Third Schedule within fourteen (14) days after receipt by the Vendor's solicitors of the purchaser's written demand specifying the amount of such costs.

[64] The express words in the said cl. 29(2) therefore clearly provides that the purchasers are to be entitled to "make good the said defect, shrinkage or other faults himself and to recover from the Vendor the costs of repairing and making good the same" and to "deduct such costs from any sum which has been held by the Vendor's solicitors as stakeholder for the Vendor". I am thus of the view that this sub cl. 29(2) therefore effectively permits only the purchasers to make a claim on the stakeholder sums and not the JMB for this purpose. This however does not in my view infringe with the JMB's sole right to manage and maintain the common property which is a different issue altogether.

Utilisation Of The Remainder Sums

[65] This court has already held above in accordance with s. 3 of the HDA, that once the liquidator steps into the shoes of the company, the liquidator takes over from the "developer" and is duty-bound to carry out the duties and obligations of the company herein under the HDA. Following from this once the stakeholder sums have been released to the company, the said

stakeholder sums will then become an asset of the company and the liquidators will thereafter have to deal with the same and utilise the monies accordingly in accordance with s. 7A(5) and (6) of the HDA.

[66] The Third Schedule of the SPAs, as can be seen at p. 28 of the liquidators, affidavit-in-support, states that the stakeholder sums shall be released to the company as payment after the expiry of 24 months after delivery of vacant possession. From the facts before me, I find that the defect liability period had expired, and as such I agree with the liquidators that the stakeholder sums are to be regarded as general monies held in the housing development account.

[67] The Housing Development (Housing Development Account) Regulations 1991 ("Account Regulations"), in particular reg. 4(1) thereto provides that:

> (1) A licenced housing developer shall deposit forthwith into the housing development account all monies whatsoever, whether in respect of instalments of purchase price or otherwise, paid by a purchaser in relation to his purchase of a housing accommodation in a housing development.

[68] Rule 7 of the Account Regulations on the other hand stipulates the purposes for which the monies in the housing development account maybe withdrawn which includes *inter alia* the payment of all outgoings including quit rent, rates, taxes, assessments and other charges levied in respect of the land on which the housing development, the payment of stamp duty payable on a charge, caveat, debenture, guarantee or memorandum of deposit of title to, the payment of any defect, shrinkage or other fault pertaining to the project during the defect liability period; and in general any other expenses reasonably incurred in relation to the housing development.

[69] However, r. 7 of the Account Regulations does not stipulate the priority in which monies in the account has to be paid out or utilised.

[70] The liquidators had submitted that they should be able to exercise their discretion in respect of the monies in the account so long as it is within the framework of the SPAs and the Account Regulations. I was referred by counsel for the liquidators to cl. 11 of the SPAs which stipulates:

> (1) The Proprietor/Vendor shall, at its own cost and expense and as expeditiously as possible, apply for subdivision of the said Building or Land intended for subdivision into parcels, as the case may be, so as to obtain the issue of a separate strata title to the said Parcel under the Strata Titles Act 1985.
>
> (2) Upon the issuance of the strata title to the said Parcel and subject to the payment of the purchase price by the Purchaser to the Vendor in accordance with subclause 4(1) and the observance of all the terms and conditions herein provided, the Vendor shall, within twenty-one (21)

A days, execute or cause the Proprietor to execute a valid and registrable Memorandum of Transfer of the said Parcel in favour of the Purchaser, and the Vendor shall forward the same together with the strata title to the Purchaser.

[71] I have read the said cl. 11 of the SPAs and hold that the said clause B must be read in conjunction with the other clauses in the SPAs in its entirety. Pursuant to cl. 29(1) of the SPAs, any defect which becomes apparent within a 24 months period from the date of vacant possession is to be made good by the vendor within 30 days of the vendor having received written notice thereof from the purchaser. The said cl. 29(1) reads as follows:

C Defect liability period

29. (1) Any defect, shrinkage or other faults in the said Parcel or in the said Building or in the common property which shall become apparent within a period of twenty-four (24) calendar months after the date the Purchaser takes vacant possession of the said Parcel and which are due D to defective workmanship or materials or; the said Parcel or the said Building or the common property not having been constructed in accordance with the plans and description as specified in the First and Fourth Schedule as approved or amended by the Appropriate Authority, shall be repaired and made good by the Vendor at its own cost and expense within thirty (30) days of the Vendor having received written E notice thereof from the Purchaser.

[72] It is only after the said period referred to in cl. 29(1) of the SPAs expiring can the purchasers carry out the works to repair and make good such defect and then recover from the company as the developer, the costs of such rectification as seen in cl. 29(2) of the SPAs, which has also been referred F to earlier in my grounds herein. It is not as submitted by the counsel for the liquidators that the purchasers must first carry out the works to repair and make good the defect and then only recover from BKP the costs of such rectification.

[73] As there is clearly no provision in the SPAs or the Account G Regulations which speak of the manner of priority in which monies in the account has to be paid out or utilised, I am reminded that Parliament in its infinite wisdom has saw it fit not to provide any manner of priority in terms of payments to be made by the developer under the HDA and it will thus not be for this court to depart from such clear intention.

H **[74]** After due consideration of the SPAs and the obligations therein read together with the HDA, it is this court's view that the developer's obligations, *albeit* now the liquidators stepping into the shoes of the developer and thus currently the liquidators under the same having assumed those obligations, are all obligations which in the ordinary course of business has I to be fulfilled by the developer. Unfortunately, in a liquidation scenario, the liquidator will invariably be faced with insufficient funds to settle each and every obligation under the SPAs and the HDA.

[75] Nonetheless, it is my view that the liquidators, as the custodian of the stakeholder sum under the HDA, should be entrusted with the discretion as to how the stakeholder sums is to be utilised to fulfil the outstanding obligations of the housing developer.

[76] Under the Strata Titles Act 1985, it is the duty of the developer to apply for the strata titles in accordance with s. 8 of the Strata Titles Act 1985 which states:

> (1) The original proprietor of any alienated land on which there is a building capable of being issue with strata titles shall, within the period specified in subsections (2) and (3), apply in accordance with subsections 8A(1) and 9(1) for the subdivision of the building or land if at any time he has sold or agreed to sell any parcel in such building to any person.

[77] The relevant periods to apply for the subdivision of the building are thereafter mentioned in sub-ss. 8(2) to (4). In short, from a perusal of the said sub-sections, and based on the facts of the matter before this court, the period in which the developer is required to apply for subdivision is three months from the first such sales or agreement took place and under sub-s. 8(5) the period specified may, on an application made before its expiry, be extended once by the Director for any further period not exceeding three months.

[78] I therefore hold from a reading of the Strata Titles Act 1985 that as it is the duty of the developer *albeit* currently the liquidators herein, to apply for the strata titles in accordance with the Strata Titles Act 1985 and a penalty in the form of the same being an offence and punishable by a fine of not less than RM10,000 but not more than RM100,000 and to a further fine of not less than RM100 but not more than RM1,000 for each day the offence continues to be committed as prescribed in s. 8(8)(a) therein is prescribed for the failure to comply with such an obligation, denotes that it is an obligation and/or a duty which is not only mandatory but also paramount on the developer, and now the liquidators, to perform.

[79] It would also appear in my view from a reading of the said Strata Titles Act 1985 that an application for strata titles can only be done by a developer or in this case before me, by the liquidators who have stepped into the shoes of the company who was the developer. It thus follows that the application for strata titles cannot be done by any other person(s) or third parties which would include the JMB or the purchasers of the units in Duet Residence themselves.

[80] Consequently, this would leave the only option available with regards the application for the strata titles to be undertaken by the liquidators and no one else and that too as a principal obligation to be fulfilled. I am further fortified in my finding in that the defects in respect of the common property

A can be paid off with the balance of the stakeholder sums after first applying the same for the strata titles application as aforesaid, and that the JMB can always seek for more funds from its members to top-up whatever amounts which are insufficient to cover the costs of the rectification of defects in the common property and thereafter act accordingly. The same of course cannot B be said of the application for strata titles which, at the risk of repetition, cannot be undertaken by the JMB.

[81] Based on the assertion by the liquidators at exh. "AH1" of the supplemental affidavit in encl. 6, the liquidators will require approximately RM120,000 to complete the application and issuance of the strata titles and C thereafter completing the application for strata title, there will be approximately RM3,193,654.84 left for the liquidators to carry out other obligations under the SPAs and in the winding up of the company. After a careful consideration of the same and the balance therein left, I am of the view that the liquidators would then be able to perform their only other D obligation left in the SPAs, which is for the liquidators to appoint a contractor and rectify the defects which includes the allegedly critical and endangering defect to the swimming pool as well as the potentially corroding beam affecting the structure of the whole building which the JMB has projected the costs of rectification works for the common property of Duet Residence at RM1,380,355. E

[82] It is only thereafter open to the liquidators, pursuant to s. 7A of the HDA, to apply the balance monies, if any, in accordance with the law of winding up ie, the payment of dividend to the unsecured creditors in a *pari passu* manner.

F **[83]** It is always open to the JMB, should there still be insufficient sums to rectify the alleged defects in the common property, to fulfill its duty under the SMA 2013 and call for another EGM to collect additional sums from the purchasers for the purpose of the top-up required to rectify whatever defects that may still exists in the common property of the Duet Residence although G I must however emphasise that this court's decision herein is not based on the making of a finding that there is no alleged critical, hazardous or potentially life threatening defects in Duet Residence nor is this court ignoring and/or failing to prioritise the defect to the common property.

[84] I would also like to touch on the case of *JMB Silverpark Sdn Bhd v. H Silverpark Sdn Bhd & Anor* [2012] 1 LNS 1082 which the JMB's counsel claims to decide on the legal right of the JMB of the common property and held that when it comes to the issues of the common property and the statutory SPA ought to be construed with the relevant statutory laws ie, the Strata Titles Act 1985. The decision in *JMB Silverpark Sdn Bhd* (*supra*) must I be read in the context of that case itself when the learned judge decided that there is no provision in the statutory SPA for the first defendant therein, as

developer, to contract out of the provisions of the SPA and the facts thereto which concerned the clubhouse which was never intended to be separate from the development therein, whereby it formed an integral part of the development and is a common property under the statutory SPA and the two statutes ie, the Strata Titles Act 1985 and the Building and Common Property (Maintenance and Management Act 2007.

[85] Again with respect, I therefore do not see that *JMB Silverpark Sdn Bhd* (*supra*) had held as a general rule that the issues of the common property and the statutory SPA ought to be construed with the relevant statutory laws ie, the Strata Titles Act 1985, although I do agree that the said case reinforces the JMB's sole right to manage and maintain the common property which I have stated above in my grounds herein does not affect the JMB by virtue of the said cl. 29 of the SPAs.

[86] Based on my above reasonings, I am therefore unable to accede to the contention by the JMB that cl. 29 of the SPAs does not sit well with the SMA 2013 and ought to be read in conjunction with the coming into force of the SMA 2013, as it is my view that the said cl. 29 can be applied in the manner as suggested by me and which I find based on the facts of the matter before me, that the duties of the JMB *vis a vis* the SMA 2013 can still be performed by the JMB without cl. 29 as being seen to be in conflict and/or contrary to the clear provisions of the SMA 2013 namely the JMB duties and powers to the common property under s. 21 of the SMA 2013.

[87] I am also unable to accept that the effect of s. 148 of the SMA 2013 renders any contract or deed contrary to the SMA 2013 as having cease to have effect as claimed by the JMB. The said s. 148 reads:

> On the coming into operation of this Act, in a local authority area or part of a local authority area or in any other area, the provisions of any written law, contracts and deeds relating to the maintenance and management of buildings and common property in as far as they are contrary to the provisions of this Act shall cease to have effect within the local authority area or that other area.

[88] This court is of the view that s. 148 of the SMA 2013 only affects the contracts or deeds "relating to the maintenance and management of buildings and common property" and not all other contracts or deeds entered into affecting the purchase of the property under an SPA or the right to the stakeholders sums therein. I therefore cannot accept that *Plaza 393 Management Corporation v. Ekuiti Setegap Sdn Bhd* [2016] 1 LNS 1398 relates to all contracts or deeds but only to those contracts or deeds relating to the maintenance and management of buildings and common property as *Plaza 393 Management Corporation* (*supra*) concerned an agreement dated 19 July 2011 entered between the defendant therein and signed by the Director of the defendant and the plaintiff (signed by one N Madhavan Nair, the previous

Chairman of the plaintiff) which the defendant therein contended that pursuant to the said agreement, the defendant would maintain its own common area at its own cost and expenses, whilst the plaintiff maintains the MC's Common Area at its own cost and expenses, which was of course contrary to the SMA 2013 and which in those circumstances would then offend s. 148 of the SMA 2013.

Liquidators Administration Expenses And Remuneration

[89] I will finally address the issue of the sum of RM1,236,000 as estimated by the liquidators as liquidation administration expenses (which includes liquidators' remuneration (calculated on a time-cost basis), solicitors' fees and disbursements, and all other cost and expenses of the winding up, be allocated or "ring-fenced" and to be paid out accordingly.

[90] It is undisputed that the paramount duty of the liquidators is to ensure an effective and efficient completion of the winding up of the company and as the liquidators have taken over the conduct as housing developer of Duet Residence, the liquidators will require money to properly discharge the contractual obligations of BKP. In this respect I have viewed the minutes of meeting dated 5 December 2019 in exh. "AH22" of encl. 2 where the creditors of the company had approved the liquidators' remuneration to be paid on a time-costs basis, which I find is in accordance with s. 479(2)(b) of the Companies Act 2016 which provides:

> (2) A liquidator other than the Official Receiver shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined by:
>
> (a) an agreement between the liquidator and the committee of inspection, if any;
>
> (b) where there is no agreement or where there is no committee of inspection, a resolution passed at a meeting of creditors by a majority of not less than three-fourths in value and one-half in number of the creditors present in person or by proxy and voting at the meeting and whose debts have been admitted to vote, which meeting shall be convened by the liquidator by a notice to each creditor to which notice shall be attached a statement of all receipts and expenditure by the liquidator and the amount of remuneration sought by him; or
>
> (c) if the agreement or determination under paragraph (a) or(b) fails, the Court.

[91] I have also observed that in exh. "AH2" of the supplementary affidavit in encl. 6 that the liquidators estimate that they would require RM1,236,000 as administrative expenses, which include the liquidators' remuneration for the completion of the obligations under the SPAs and the conduct of winding down the business of the company, as well as legal fees.

[92] As the JMB does not deny that the liquidators' remuneration is to be paid on a time-costs basis save that the JMB contends that (i) it was not categorically stated as to what is the source of the remuneration; (ii) there is no agreement that the remuneration will be from the stakeholder sums; and (iii) that it will contravene s. 7A of the HDA; or (iv) that will contravene the priority in payment per s. 7A(6)(b) of the HDA, the latter two points of which this court has already dealt with in this grounds above; and as this court has also held that the liquidators had complied with and obtained the approval of the creditors pursuant to s. 479(2)(b) of the Companies Act 2016, the sum of RM1,236,000 as estimated by the liquidators as liquidation administration expenses (which include liquidators' remuneration (calculated on a time-cost basis), solicitors fees and disbursements, and all other cost and expenses of the winding up are in this court's view fair and reasonable.

Decision

[93] All in, this court holds that:

(i) the liquidators are duty bound to carry out the duties and obligations of the company under the HDA *vis a vis* as the housing developer of the Duet Residence; and

(ii) it would be just and equitable to allow the liquidators to deal with the stakeholder sums as per the terms of the SPAs.

[94] I accordingly answer the question posed in encl. 1 as follows:

(i) the joint management body (JMB) of Duet Residence cannot be authorised to act on behalf of the purchasers of the respective units in Duet Residence in respect of the matters under the respective sale and purchase agreements (SPAs);

(ii) the estimated sum of RM1,690,547.65 (the remainder after deducting liquidation administration expenses from the stakeholder sums of RM3,313,656.84) may be utilised, expended and paid out in the following manner:

  (a) firstly application for strata title and all expenses incidental thereto;

  (b) secondly, costs of rectification of the common properties pursuant to the SPAs;

  (c) thirdly, payments to the creditors of the company (preferred creditors, unsecured creditors and others); and

(iii) the sum of RM1,236,000 as estimated by the liquidators as liquidation administration expenses which include liquidators' remuneration (calculated on a time-costs basis), solicitors' fees and disbursements and all other costs and expenses of the winding up may be allocated or "ring fenced" and paid out accordingly.